

Division Deputy Director, Division No. 3; upon the other bond the name of K. B. Graham appears as principal, the Globe Indemnity Company as surety and the bond is conditioned to cover the faithful performance of the duties of the principal as Resident District Deputy Director in Morrow County.

Finding said bonds legal and proper as to form, I have endorsed my approval thereon and return the same herewith.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*

3967.

APPROVAL, NOTES OF SEBRING VILLAGE SCHOOL DISTRICT,  
MAHONING COUNTY, OHIO—\$10,000.00.

COLUMBUS, OHIO, January 19, 1932.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

3968.

GASOLINE TAX—REFUND OF SUCH MAY BE ASSIGNED.

*SYLLABUS:*

*A written assignment of an entire amount due as refunds of gasoline taxes under section 5534, General Code, is valid and the tax commission is authorized to accept such an assignment.*

COLUMBUS, OHIO, January 19, 1932.

*The Tax Commission of Ohio, Columbus, Ohio.*

GENTLEMEN:—This will acknowledge receipt of your request for my opinion, which reads as follows:

“Will you kindly furnish us with an opinion as to the legality of an individual user of motor vehicle fuel who makes application for refund of the tax paid on such motor vehicle fuel assigning his interest in such refund to a third person?

We have a request from the X Refining Corporation with which we think you are familiar but we will explain it fully so that you will have all the facts.

This corporation wishes to sell naphtha to dry cleaners and others and at the time of sale they will bill the purchaser for the price of the naphtha also the tax but they will make collection of only the price of the naphtha and within thirty to sixty days they will have their customer assign his rights to refund of the tax to themselves, the X Refining Corporation. The user will make out his application for refund in the usual manner and at the same time will assign his right to the refund to the X Refining Corporation.

The only change that they are requesting is that instead of individual checks being made to the user, individual checks are to be made to the seller or one check may be issued to the seller to cover all assignments for a certain period.”

Your inquiry involves the authority to recognize valid assignments of refunds due under section 5534 of the motor vehicle tax law of Ohio. Section 5534 reads as follows:

“Any person who shall use any motor vehicle fuel on which the

tax herein imposed has been paid, for the purpose of operating or propelling stationary gas engines, road rollers, power shovels, tractors not used on public highways, motor boats or aircraft, or who shall use any such fuel upon which the tax herein provided for has been paid, for cleaning or dyeing, or any other purpose than the propulsion of motor vehicles, shall be reimbursed to the extent of the amount of the tax so paid on such motor vehicle fuel in the following manner: Provided, however, that such applications for refunds must be filed with the tax commission of Ohio within ninety days from the date of purchase or invoice.

Such person shall file with the tax commission of Ohio an application for refund, stating the quantity of fuel used for purposes other than propulsion of motor vehicles as set out in this section. Such application shall be accompanied by the original invoice, or certified copy thereof, showing such purchase together with evidence of payment thereof, and also the duplicate statement described in section 5532 of the General Code. On filing of such application, invoice and duplicate statement in the form herein prescribed, the tax commission of Ohio shall determine the amount of refund due and, within thirty (30) days from the time of filing the same, shall certify such amount to the auditor of state. The auditor of state shall thereupon draw a warrant for such certified amount on the treasurer of state in favor of the person claiming such refund. Such refund shall be paid by the treasurer of state from the rotary fund hereinafter provided for. The tax commission shall require the application provided for herein to be supported by the affidavit of the claimant."

The above section, you will note, does not provide specifically for the assignment of refunds nor is there any specific prohibition of the same and therefore consideration must be given to the law of assignments generally.

An assignment according to the legal usage of the term, is a transfer or setting over of property, or of some right or interest therein, from one person to another. In its general usage the word is sufficiently comprehensive to include transfers of all kinds of property and property rights, but in its technical legal usage it is ordinarily limited in its application to the transfer of those intangible property rights, commonly designated as choses in action, and other rights in and connected with property, as distinguished from the tangible property itself. 3 O. Jur. 245.

The courts of Ohio as well as those of other states in determining the right of assignability have inquired in certain instances relative to the right or interest to be assigned.

1. Does such a claim or debt survive the executor or administrator?
2. Is the assignment in whole or in part?
3. Does public policy forbid such an assignment?
4. Will the assignment affect the equity which existed between the original parties?
5. Is the assignment founded upon a right in being?
6. Is the right sought to be assigned personal in its nature?
7. Is it necessary that a particular assignment be written and that delivery of the instrument be made?

Your communication indicates that the individual user of motor vehicle fuel is entitled to the refund and that in making the assignment of the claim for re-

funds to the dealer the user completes all the formalities necessary in making his claim directly to the tax commission. In other words, I assume that in addition to a written assignment which the individual user executes to the assignee, he also prepares the affidavit showing the gallonage purchased and the use of said motor vehicle fuel as well as the evidence that the tax has been paid by such user, and, further, that this evidence together with a written assignment will be transmitted to the commission by the assignee in making an application for the payment of such refunds.

An analysis of the above facts leads me to the conclusion that it meets with all incidents recognized by the courts in determining the question of assignability of a chose in action except the question as to whether public policy would operate to prevent the recognition of such assignments. With reference to the assignments of debts due from municipalities the court in *C. A. Chapman, Trustee, vs. The Forest City Savings Bank Company*, 16 O. C. C. (n. s.) 488, held that a verbal assignment with the consent of a city of funds due by the city to a contractor is valid, citing in support thereof *Brooks Co. vs. Toleman*, 6 C. C. (n. s.) 137; *Rodijkeit vs. Andrews*, 74 O. S., 104. Likewise in the Circuit Court of Summit County is the case of the *City of Akron vs. Elias S. Day, et al.*, 16 O. C. C. (n. s.) 232, states a similar rule in the syllabus, which is as follows:

"An order, drawn on a fund due a city contractor, if accepted by the fiscal officer of the city, must be paid out of appropriations made by the council for the payment of the contractor."

It is noted therefore that the courts have found that no public policy is violated in the case of assignments of debts due from municipalities. Apparently no objection has been found by the courts as to the assignment of claims due from a county. The general rule is stated in 15 O. Jur., 663, as follows:

"Claims against a county may be assigned and such assignments are binding on the county board or to a member thereof. The assignee, however, takes the claims subject to all defenses."

To the same effect, see 44 Neb., 110, which involves a contract to build a county court house, the court holding that an assignment of money to become due from the county is valid.

The General Code of Ohio recognizes specifically the right of assignment in connection with contracts for the construction of township roads. In section 3298-15h, it is provided that nothing shall prevent the payment of any assignment by the contractor to material men or one who has furnished labor. Regarding debts due from the state, it appears that the court in the case of *State ex rel Cowen, State Highway Commissioner vs. Robins & McDaniel, et al.*, 10 O. App., 382, recognized the validity of an assignment by the contractor of monies due and to become due from the State Highway Department.

One of my predecessors, in an opinion directed to the State Highway Commissioner, said opinion being found in the Opinions of the Attorney General, 1915, Vol. 3, p. 2334, said as follows:

"An assignment by a contractor on state highway work of all the compensation due or to become due to him under his contract, or all of any particular installment or installments to become due is valid and

must be recognized by the state highway commissioner. An assignment of a part of the compensation due or a part of an installment to thereafter become due, may or may not be recognized by the state highway commissioner at his option."

The above question recognizes the definite right of a contractor to assign compensation already earned. The courts have generally extended this right to unearned compensation under an existing contract and the rule in Ohio seems to be generally that a contingent debt, founded on an existing contract, is property which is assignable.

In the absence of the possibility that any fraud may be perpetrated upon the state, I see no violation of the principle of public policy but rather recognize a saving in the cost of administration in that refunds due under several applications may be payable to one person, the assignee, and thus obviate the necessity of the preparation of several warrants and the additional expense of remitting such payments.

In view of the above considerations, and in specific answer to your inquiry, I am of the opinion first, that a written assignment of an entire amount due as refunds under section 5534, General Code, is valid; second, that the tax commission is authorized to accept written assignments of refunds due under the gasoline tax law of Ohio.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

3969.

APPROVAL, BOND FOR THE FAITHFUL PERFORMANCE OF HIS DUTIES AS RESIDENT DISTRICT DEPUTY DIRECTOR IN AUGLAIZE, LOGAN AND SHELBY COUNTIES—OSCAR F. SCHILLING.

COLUMBUS, OHIO, January 20, 1932.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted a bond in the penal sum of \$5,000.00 upon which the name of Oscar F. Schilling appears as principal and the Commercial Casualty Insurance Company of Newark, New Jersey, appears as surety, conditioned to cover the faithful performance of the duties of the principal as Resident District Deputy Director assigned to Auglaize, Logan and Shelby Counties.

Finding said bond legal and proper as to form, I have endorsed my approval thereon and return the same herewith.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General*

3970.

TEMPORARY BOARD OF EDUCATION—MAY NOT ELECT CLERK FOR TERM LONGER THAN LIFE OF BOARD.  
SYLLABUS:

*A board of education, appointed for a newly created school district, in accordance with Section 4736, General Code, is without power to elect a clerk for a term*